STATE OF MICHIGAN

COURT OF APPEALS

GLADYS E. SCHUHMACHER, WALTER F. SCHUHMACHER, II, and DOROTHY J. SCHUHMACHER, Plaintiffs-Appellants,	UNPUBLISHED April 26, 2011
v	No. 295070 Ogemaw Circuit Court
ELAINE H. DEMASI and CAROLYN A. HARDACRE, Defendants-Appellees.	LC No. 08-656983-CH

Before: SERVITTO, P.J., and GLEICHER and SHAPIRO, JJ.

PER CURIAM.

In this real property ownership dispute, plaintiffs, Gladys Schuhmacher, Walter Schuhmacher, II, and his wife Dorothy Schuhmacher, appeal as of right a circuit court order granting summary disposition to defendants, Elaine Demasi and Carolyn Hardacre. We affirm.

Plaintiffs filed suit seeking to quiet title to a 40-acre wooded parcel of land in Ogemaw County, in reliance on a theory of adverse possession. The complaint alleged that plaintiffs and defendants held deeds to adjacent Ogemaw County properties, and that defendants and a third person received a conveyance of the 40 acres at issue from Arthur Schuhmacher in May 1981. In October 2007, after the third owner died, defendants obtained a trust deed conveying the 40 acres to them. Plaintiffs Walter Schuhmacher and Dorothy Schuhmacher bought a land contract interest in an adjacent 10-acre parcel of property in 1993, from their mother, Gladys Schuhmacher, who had become owner of the 10 acres pursuant to a deed from her late husband.

According to the complaint, over the course of the preceding 70 years plaintiffs and members of their family had hunted on the property, birdwatched, camped, hiked, walked, drove off-road vehicles, played paintball, snowmobiled, "constructed road and trails, drain tubes and posted the property [no trespassing]," and "removed other individuals who have attempted to hunt and use the property." The complaint also noted that plaintiffs had not paid real property taxes for the 40-acre parcel since 1982. The complaint characterized plaintiffs' possession of the 40-acre parcel as "actual, visible, open, notorious, exclusive, continuous, and uninterrupted."

The circuit court entered an opinion finding summary disposition for defendants' appropriate under MCR 2.116(C)(10).[1] The court summarized the evidence and reasoned as follows:

> Defendants paid the taxes and made infrequent visits to the property including a visit to plaintiff Gladys Schuhmacher at her cabin on the 10 acres. Plaintiff Gladys Schuhmacher acknowledges that she respected the property line but makes some claim based on an allegation of a vague oral agreement of the 40 acres reverting to her father-in-law based on who died first. However, even if this could be proven that claim would have to be asserted by the estate of her father-in-law, not the plaintiffs herein.
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> The plaintiffs never fenced or prohibited defendants access to the property, nor gave any notice of any kind to defendants of their claim.
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> Under *DuMez v Dykstra*, 257 Mich 449[; 241 NW 182] (1932), plaintiffs are required to give notice by a word or act beyond mere use of wild lands of their claims. It is assumed that owners of wild lands give tacit permission to others to use for hunting and to cross wild lands. *Id*. at 451.
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> Plaintiffs [sic] use of wild lands under the facts in this case do [sic] not meet the minimum necessary for adverse possession even if they had given notice of their claim by some act other than use, which they did not. Further, Plaintiffs' use of defendants [sic] land did not demonstrate that the use was hostile, which is one of the showings required.
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> Therefore plaintiffs have failed to meet even the minimum standards for adverse possession and further have failed to give some notice other than use of their claim of adverse possession to wild lands.

Plaintiffs maintain that the circuit court ignored material issues of fact precluding summary disposition. We review de novo a circuit court's summary disposition ruling. *Robertson v Blue Water Oil Co*, 268 Mich App 588, 592; 708 NW2d 749 (2005). A motion brought under MCR 2.116(C)(10) "tests the factual support of a plaintiff's claim." *Walsh v Taylor*, 263 Mich App 618, 621; 689 NW2d 506 (2004). "Summary disposition is appropriate under MCR 2.116(C)(10) if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *West v Gen Motors Corp*, 469 Mich 177, 183;

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[1] Defendants had moved for summary disposition pursuant to MCR 2.116(C)(5), (8), and (10). The circuit court did not expressly mention subrule (C)(10) in its opinion, but the court plainly considered material beyond the pleadings. MCR 2.116(G)(5). We presume for purposes of this appeal that the factual allegations in plaintiffs' complaint "and any reasonable inferences or conclusions that can be drawn from the facts," adequately state an adverse possession count. *Detroit Int'l Bridge Co v Commodities Export Co*, 279 Mich App 662, 670; 760 NW2d 565 (2008) (internal quotation omitted).

665 NW2d 468 (2003). "In reviewing a motion under MCR 2.116(C)(10), this Court considers the pleadings, admissions, affidavits, and other relevant documentary evidence of record in the light most favorable to the nonmoving party to determine whether any genuine issue of material fact exists to warrant a trial." *Walsh*, 263 Mich App at 621. "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West*, 469 Mich at 183.

To establish an adverse possession claim, a plaintiff must introduce "clear and cogent proof that possession has been actual, visible, open, notorious, exclusive, continuous, and uninterrupted for the statutory period of fifteen years." *Canjar v Cole*, 283 Mich App 723, 731; 770 NW2d 449 (2009) (internal quotation omitted), citing MCL 600.5801 and MCL 600.5829. "In addition, a plaintiff must also show that the plaintiff's actions were 'hostile' and 'under claim of right,' meaning that the use is 'inconsistent with the right of the owner, without permission asked or given, and which use would entitle the owner to a cause of action against the intruder.'" *Id*. at 731-732, quoting *Wengel v Wengel*, 270 Mich App 86, 92-93; 714 NW2d 371 (2006).

Plaintiffs introduced evidence of actual, visible, open, notorious, exclusive, continuous, and uninterrupted possession through deposition testimony concerning their frequent and regular recreational use of the 40-acre parcel, and Walter Schuhmacher's testimony that he and his sons routinely ejected other people from the 40 acres, including defendants on one occasion around September 2008. With regard to the necessary hostility element of an adverse possession action, the circuit court correctly referenced our Supreme Court's pronouncement that, "in recognition of the general custom of owners of wild lands to permit the public to pass over them without hindrance," "use alone [of wild and unimproved lands] may give notice of adverse claim of inclosed premises, [but] the weight of authority is that it raises no presumption of hostility in the use of wild lands." *Du Mez*, 257 Mich at 451. When questioned regarding no-trespass posting of the 40 acres, Walter Schuhmacher recounted that he "did it annually. And then there were permanent signs along the front of the 40 and down the west side of it, partially. The landowner next door tore them down. . . . [H]e wouldn't keep anything up." Plaintiffs' repeated posting of signs and ejectment of others present on the 40 acres were actions not undertaken by the adverse possession claimant in *Du Mez*, 257 Mich at 450-451, and, viewed most favorably to plaintiffs, plaintiffs' conduct as a whole arguably satisfies the hostility element. See *Jonkers v Summit Twp*, 278 Mich App 263, 273; 747 NW2d 901 (2008) ("In the adverse-possession context, 'hostility' refers to use of property without permission and in a manner that is inconsistent with the rights of the true owner.").

But the deposition testimony of plaintiffs agreed that they did not satisfy the claim of right prerequisite to an adverse possession claim. In *Smith v Feneley*, 240 Mich 439, 441-442; 215 NW 353 (1927), our Supreme Court elaborated concerning the meaning of a claim of right:

> The belief or knowledge of the adverse claimant is not as important as his intentions. *The intention is the controlling consideration* and it is not the knowledge or belief that another has a superior title, but the recognition of that title that destroys the adverse character of possession. Claim of title or claim of right is essential to adverse possession, but it is not necessary that an adverse claimant should believe in his title, or that he should have any title. He may have no shadow of title and be fully aware of that fact, *but he must claim title*. He may go into possession without any claim of title, but *his possession does not become*

> *adverse until he asserts one*; and he may assert it by openly exercising acts of ownership, with the intention of holding the property as his own to the exclusion of all others. [Emphasis added.]

Gladys Schuhmacher testified that when she owned and resided on the 10-acre parcel adjacent to the 40-acre parcel in dispute, she commissioned a survey, which placed the boundary shared by the 10-acre parcel and the 40-acre parcel. With regard to the boundary line, Gladys Schuhmacher expressed, "We always knew where . . . what we owned," and replied affirmatively when asked, "So after it was surveyed, . . . you respected that property line?" Similarly, Walter Schuhmacher testified that he had not intended "to take property that wasn't" his. Dorothy Schuhmacher, Walter's wife of nearly 15 years, voiced her belief that the 40-acre property had previously belonged to her husband's grandfather and currently belonged to "a Schuhmacher[]," and she responded affirmatively to the inquiry, "You never intended to take the [40-acre parcel of] property; you just thought it was yours?" The concessions of Gladys Schuhmacher and Walter Schuhmacher that they did not intend to assert ownership over the 40-acre parcel preclude them from establishing the claim of right prerequisite to an adverse possession claim. See *Ennis v Stanley*, 346 Mich 296, 304-305; 78 NW2d 114 (1956) (rejecting the adverse nature of the plaintiffs' claim of right in light of one plaintiff's testimony that he did not intend "to claim title to" land that he did not own). Consequently, the circuit court reached the correct result in granting defendants summary disposition pursuant to MCR 2.116(C)(10). *Fisher v Blankenship*, 286 Mich App 54, 70; 777 NW2d 469 (2009); *Walsh*, 263 Mich App at 621.

Affirmed.

/s/ Deborah A. Servitto
/s/ Elizabeth L. Gleicher